No. 80-323

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Respondents.

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE, AS *AMICUS CURIAE*

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MOTION OF ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The All-Industry Television Station Music License Committee ("All-Industry Committee") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petition of CBS, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on April 3, 1980.* This motion is necessitated by the refusal of

* The opinion of the Court of Appeals is reported at 620 F.2d 930 (2d Cir. 1980) and appears as Appendix A to CBS' petition.

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counsel for respondents, American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), to grant permission to file such *amicus* brief.* The Committee's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus Curiae*

The All-Industry Committee has for many years represented the interests of the vast majority of the more than 700 local television stations nationwide in connection with the procurement of music performance licenses from ASCAP and BMI.** The Committee is currently supporting and financing (through contributions from local television stations) a class action lawsuit on behalf of all local television stations (other than the fifteen network-owned-and-operated stations) in the United States District Court for the Southern District of New York. That lawsuit directly challenges the legality of the ASCAP and BMI local television station blanket licenses under the antitrust laws. *Buffalo Broadcasting Company, Inc., et al.* v. *American Society of Composers, Authors and Publishers, et al.*, 78 Civ. 5670 (filed November 27, 1978).†

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* In contrast to their present refusal, when this case initially was reviewed by this Court, respondents granted permission to the All-Industry Committee to participate as *amicus curiae* and a brief was filed on behalf of the Committee at that time.

** The stations represented by the Committee, for these purposes, consist of both network-affiliated stations and stations operating independently of network affiliations.

† In addition, those television stations which are network affiliates have been obligated, pursuant to their affiliation contracts, to reimburse the networks for part of the networks' ASCAP and BMI royalty payments. Thus, these stations have a direct pecuniary interest in the resolution of the legality of the network blanket licenses.

The All-Industry Committee filed an *amicus* brief in connection with this Court's initial determination of this case, filed *amicus* briefs at two stages of the Court of Appeals proceedings, and, at the invitation of the Court of Appeals, participated in oral argument before the Court of Appeals upon the remand from this Court's initial decision.

This Court's initial determination in this case* left no doubt as to the legal standards which were to govern the assessment of the legality of the network blanket licenses. The plain significance of that opinion lay in the Court's determination that while the ASCAP and BMI blanket licenses unquestionably restrain competition,** they are not so blatantly anti-competitive in all circumstances and in all of their "manifestations" as to warrant a declaration of automatic illegality (441 U.S. at 24). Accordingly, this Court reversed the prior Court of Appeals' holding of *per se* illegality,† declaring instead that, "when attacked, [the blanket license] should be subjected to a more discriminating examination under the rule of reason" (441 U.S. at 24).

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* *Broadcast Music, Inc., et al.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (Appendix C to CBS' petition).

** The Court noted, for example, that the blanket licenses constitute "'price fixing' in the literal sense" (441 U.S. at 8) and that "the blanket license fee is not set by competition among individual copyright owners . . . ." (441 U.S. at 23). Likewise, Justice Stevens' dissenting opinion concluded that "the challenged policy does have a significant adverse impact on competition" (441 U.S. at 26).

† *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers, et al.*, 562 F.2d 130 (2d Cir. 1977) (Appendix D to CBS' petition).

The role for the Court of Appeals upon remand thus seemed clear. It having been determined that the blanket licenses constitute restraints, the sole remaining determination was whether those restraints could, nonetheless, be sustained as legal in the television network context under the "more discriminating examination" mandated by this Court. Under traditional rule of reason principles, this "more discriminating examination" required the Court of Appeals to balance possible pro-competitive justifications for the network blanket licenses against their anti-competitive effects. *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). The legality or illegality of the network blanket licenses under the Sherman Act would depend upon the outcome of that analysis.

While concurring that its task was to assess under the rule of reason "the blanket license as employed by the television networks" (620 F.2d at 934), and while further recognizing that "[a] rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects" *(id.)*, the Court of Appeals nonetheless decided that the issue of whether the network blanket licenses constitute restraints of trade at all had not been foreclosed by this Court's (or indeed its own earlier) opinion (620 F.2d at 934-35). Moving from this fundamental misreading of the clear import of the prior proceedings, the Court of Appeals then departed from all precedent in concluding, in the context of the television networks, that since CBS had "realistically available marketing alternatives" to the ASCAP and BMI blanket licenses, those licenses in fact did not even constitute restraints of trade (620 F.2d at 935-39).

While the local television stations' own rule of reason case was expressly left untouched by the Court of Appeals,* the Court of Appeals' view as to whether the ASCAP and BMI licenses constitute a "restraint" in the first place is so clearly erroneous, even in the context of CBS' *network* case, that it should not be left to stand.

The annexed *amicus* brief discusses in greater detail these fundamental errors by the Court of Appeals.

Respectfully submitted,

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* The confinement of the Court of Appeals' analysis to consideration of "the blanket license as employed by the television networks" was said by the court to be of potential "significance" since "the lawfulness of the blanket license has also been challenged by non-network broadcasters" (620 F.2d at 934 n.6).

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BRIEF OF ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE, *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Reasons for Granting the Writ

I. The Court of Appeals' Failure to Find That the Network Blanket License "Restrains" Trade Contravenes This Court's Prior Opinion

There can be no doubt as to whether ASCAP's and BMI's blanket licenses restrain trade within the meaning of the Sherman Act.

The Court of Appeals was initially so convinced of the pernicious nature of the blanket licenses that it found them to constitute *per se* illegal price fixing arrangements. *Columbia Broadcasting System, Inc.* v. *ASCAP, et al.*, 562 F.2d 130 (2d Cir. 1977). This Court's reversal of the earlier Court of Appeals decision was not predicated on the finding that the blanket licenses do not amount to a restraint—which would have ended the inquiry and avoided the necessity of a remand—but on the determination that, although they do eliminate competition among individual copyright owners (441 U.S. at 23) and amount to "'price fixing' in the literal sense" (441 U.S. at 8), the licenses should not be regarded as *per se* unlawful, given the unique circumstances of the industry and the "milieu" in which those licenses developed (441 U.S. at 20).* In the circumstances, the Court of Appeals' "literal

* Specifically, the Court found that since the blanket license "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations" (441 U.S. at 22), there were some circumstances where, absent the blanket license, "the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all" (441 U.S. at 19). The Court made clear its reference here to the "milieu" of "individual radio stations, night clubs, and restaurants" (441 U.S.

(footnote continued on next page)

approach" to illegality was insufficient to "establish that this particular practice is . . . plainly 'anticompetitive' and very likely without 'redeeming virtue' " (441 U.S. at 9), *i.e.*, that the practice was unlawful "on its face" in all circumstances (441 U.S. at 13). Finding, therefore, the Court of Appeals' *per se* rule "difficult to contain" (441 U.S. at 16), the Court concluded:

> "[W]e cannot agree that [the blanket license] should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today" (441 U.S. at 24).

Clearly, this Court's mandate that the licenses be subjected to "a more discriminating examination under the rule of reason" was a recognition that the licenses do in fact constitute restraints of trade.

This being the case, the sole inquiry left for the Court of Appeals on remand was to determine the reasonableness of the restraint in its television network "manifestation." Such analysis would entail a balancing of the anti-competitive effects of the challenged arrangement against any offsetting pro-competitive justifications. *National Society*

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at 20), where the blanket license originated, and where "the disk-jockey's itchy fingers and the bandleader's restive baton" precluded as a practical matter the negotiation of music rights "well in advance of the time of performance" (441 U.S. at 22 n.37).

The Court at the same time contrasted the situations in which music rights could be individually and directly negotiated—"dramatic rights . . . [and] other rights, such as sheet music, recording, and synchronization" (*id.*)—in which there would be little, if any, justification for a blanket license.

of Professional Engineers v. *United States*, 435 U.S. 679, 692 (1978); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The submission of the Department of Justice to the Court of Appeals, at the court's request, confirmed the nature of the necessary analysis:

> "[T]he undisputed evidence of certain noncompetitive market characteristics which have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anticompetitive effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits" (Brief for the United States as *Amicus Curiae*, filed November 5, 1979 at 20).

Notwithstanding all of the foregoing, the Court of Appeals concluded that neither its own prior opinion (that the blanket license was not only a restraint but was *per se* illegal), nor this Court's ruling, had foreclosed a holding on remand that the network blanket license did not restrain trade in any respect (620 F.2d at 934-35). The All-Industry Committee respectfully submits that the Court of Appeals' interpretation of this Court's holding on that issue was plainly erroneous and standing alone warrants review of the Court of Appeals decision. In addition, however, the Court of Appeals' misperception led the court to commit even more serious errors.

II. The Court of Appeals' Rationale for Finding No Restraint of Trade Is Clearly Erroneous

Having concluded that this Court had not determined whether the ASCAP and BMI blanket licenses constitute restraints of trade within the meaning of the Sherman Act, and ignoring its own previous opinion that those licenses constituted *per se* illegal restraints, the Court of Appeals proceeded to make its own determination of that issue. Ignoring all relevant antitrust precedent, and citing virtually none of its own, the court below reached the conclusion that, since CBS might have resorted to "realistically available marketing alternatives" to the network blanket licenses, the licenses could not, in the circumstances, be said to restrain or eliminate competition (620 F.2d at 935-39). This being the case, the court concluded, it was unnecessary to engage at all in a balancing of the pro- and anti-competitive effects of the licenses (620 F.2d at 934-35).

As an initial matter, the Court of Appeals' determination that the blanket license does not restrain competition is flatly inconsistent with the court's own findings (not to mention the entire thrust of the earlier Court of Appeals opinion). The court acknowledged that "there is no price competition between separate musical compositions" (the blanket license being "the only device by which performing rights are licensed to the networks") (620 F.2d at 935). It also recognized that since "approximately 90% of [CBS'] music is selected by the program packagers," CBS, "if it wanted a program for which performance rights had not been purchased, would have to purchase the rights for music already selected and recorded, *in which*

event no meaningful price competition among copyright owners would occur" (620 F.2d at 938-39) (emphasis added). Thus, the court recognized that the network blanket license eliminated price competition. Can it be rationally asserted—putting aside the issue of whether such elimination is legal or illegal—that eliminating price competition is not a restraint of trade? Obviously not. And yet, that is precisely what the Court of Appeals did.

But more fundamentally, it is hornbook antitrust law that "[e]very agreement concerning trade, every regulation of trade restrains. To bind, to restrain is of their very essence." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). There simply can be no debate over whether an arrangement which: constitutes "literal" price fixing (441 U.S. at 8); eliminates price competition between musical compositions (441 U.S. at 23); has a significant "adverse impact on competition" (441 U.S. at 26); and displaces competitive markets (441 U.S. at 33), constitutes a "restraint" under the Sherman Act. To state that no restraint at all exists in such circumstances is to ignore 90 years of Sherman Act precedent—and its common law foundations.*

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* As the cases cited by the petitioner, among others, amply demonstrate (see CBS' Petition for a Writ of Certiorari, filed August 29, 1980, at 21), the ability of persons affected by a restraint—especially one as obvious as that presented here—to avoid its impact simply has no bearing on its denomination as a restraint. If relevant at all, the availability of such alternatives may be merely one of the factors to be weighed in the overall rule of reason analysis as part of an evaluation of the anti-competitive effects of the arrangement. *See, e.g., Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

Conclusion

To correct the fundamental errors committed by the Court of Appeals, the Court should grant CBS' petition.

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